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FILE

Holme Roberts & Owen

Suite 400
892 North Cascade Avenue
Colorado Springs, Colorado 80903

Suite 900
50 South Main Street
Salt Lake City, Utah 84144

Attorneys at Law

Suite 4100
1700 Lincoln

Denver, Colorado 80203

Telephone (303) 861-7000
Telecopier 866-0200
Telex 43-4460

Denver Technological Center
Suite 900
8400 East Prentice Avenue
Englewood, Colorado 80111

Suite 400
1401 Pearl Street
Boulder, Colorado 80302

Joseph P. Benkert

June 2, 1992

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FEDERAL COMMUNICATIONS COMMISSION
OF THE SECRETARY

VIA TELECOPY

Ms. Donna R. Searcy, Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: GC Docket No. 92-52


Dear Ms. Searcy:

Transmitted herewith, on behalf of Playa Del Sol Broadcasters, Inc., are an original and nine copies of its Comments in the above-referenced proceeding. An additional copy is being simultaneously filed with the Commission's copy contractor.

An electronic reproduction of the original Comments containing the facsimile signature of counsel for petitioner is being filed pursuant to Section 1.52 of the Rules. Counsel will retain the original until the Commission's decision in this proceeding is final and no longer subject to review.

Questions and copies of correspondence should be directed to undersigned counsel.

Very truly yours,


Joseph P. Benkert

JPB/tmf

jpbp/a13

Enclosures

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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OF THE SECRETARY

In the Matter of)
)
Re-examination of the Policy) GC Docket No. 92-52
Statement on Comparative)
Broadcast Hearings)

To: The Commission

COMMENTS OF PLAYA DEL SOL BROADCASTERS

PLAYA DEL SOL BROADCASTERS

Michael L. Glaser
Joseph P. Benkert

HOLME ROBERTS & OWEN
1700 Lincoln, Suite 4100
Denver, Colorado 80203
(303) 861-7000

Its Attorneys

June 2, 1992

Table of Contents

	<u>Page</u>
Summary of Argument.....	ii
I. The Commission Should Consider Only Other Media Interests Serving The Same Market Under The Diversification Criterion.....	2
II. Integration Credit Should Be Awarded To Local Managers.....	7
III. Female Enhancement Credit Should Not Be Awarded..	11
IV. The Commission Should Award Comparative Credit For Continuity Of Service.....	12
V. Modifications To The Comparative Criteria Should Be Applied To Pending As Well As Future Proceedings.....	15
VI. Conclusion.....	16

Summary of Argument

Playa Del Sol Broadcasters, Inc. ("Playa Del Sol") demonstrates herein that revisions to the comparative criteria used by the Commission to select which of several mutually exclusive applications for a new broadcast station should be granted are appropriate in light of changes in the broadcast industry and the Commission's regulatory regime since adoption of the Policy Statement. Specific revisions to the criteria which appropriate include modification of the diversification criteria to focus only upon other media interests in the market concerned. Interests outside the market concerned are simply irrelevant.

Similarly, the integration criterion as currently applied ignores the recognized relationship between a station's service in the public interest and its commercial success, and the relationship between a station's commercial success and its non-owner manager's job security. Whether or not the integration criterion is revised accordingly, granting credits for integration of female owners into management has been found impermissible by the U.S. Court of Appeals for the District of Columbia Circuit, and would appear to contravene the First Amendment to the U.S. Constitution inasmuch as the Commission's rationale for granting such credit is to influence program content.

Playa Del Sol also demonstrates that rewarding service continuity will provide long term benefits to the industry and the public.

Finally, Playa Del Sol demonstrates herein that any revisions to the Commission's comparative criteria must be applied to pending and future applications and proceedings alike.

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
 OF THE SECRETARY

In the Matter of)
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 Re-examination of the Policy) GC Docket No. 92-52
 Statement on Comparative)
 Broadcast Hearings)
 To: The Commission

COMMENTS OF PLAYA DEL SOL BROADCASTERS

Playa Del Sol Broadcasters, Inc.,¹ by its attorneys
 and pursuant to Section 1.415 of the Commission's Rules,
 hereby comments upon the Notice of Proposed Rulemaking
 ("NPRM") in the above-referenced proceeding in which the
 Commission is reconsidering its Policy Statement on
Comparative Broadcast Hearings, 5 R.R.2d 1901 (1965) ("Policy
Statement"). In support whereof, the following is
 respectfully shown:

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1. Playa Del Sol Broadcasters, Inc. ("Playa Del Sol") is an applicant for a construction permit for a new FM station to operate on Channel 281A at Tucson, Arizona. Copies of these Comments are being served on all parties to that proceeding.

I. The Commission Should Consider Only
Other Media Interests Serving The Same
Market Under The Diversification Criterion

The Commission stated in the NPRM that the purpose of the diversification criterion is to promote diversity of viewpoints and to prevent undue concentration of economic power. NPRM, supra, at 9, citing FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 780 (1978). Concern with concentration of economic power was not announced as an underpinning for the diversification criterion in the Policy Statement, however, and such a concern was not a basis for the diversification criterion before adoption of the Policy Statement. Thus, in explaining and criticizing the Commission's pre-Policy Statement criteria for selecting among mutually exclusive broadcast applicants, then Hearing Examiner H. Gifford Irion stated:

For a good many years the Commission has adhered with a rather high degree of consistency to the doctrine that an application which will tend to spread ownership of media of communication should be preferred over one which will concentrate such ownership. The most striking consequence of this criterion has been to place newspapers in a disadvantageous position against competing applicants, but it also applies to parties with other broadcasting holdings. It is, of course, contrary to the Commission's rules for one person or company to hold interests in two stations of the same category within a single community, although they may simultaneously own an AM, FM or TV station in the same community. the theory behind the diversification-of-ownership doctrine is that it tends to keep the channels of communication open to as large a number of owners as possible and thus prevent restriction of news and information. Whether

this is actually accomplished in an age when so much news emanates from network sources is questionable, but, so far as local affairs are concerned (disputes over bond issues, civic problems, etc.), there is genuine ground for concern about allowing all organs of communication to be vested in the same hands.

Irion, FCC Criteria for Evaluating Competing Applicants, 43

Minn. L. Rev. 479, 487-88 (1959).

The pre-Policy Statement criteria are relevant because the Commission stated in the Policy Statement:

[W]e are not adopting new criteria which would call for the introduction of new evidence, but rather restricting the scope somewhat of existing factors and explaining their importance more clearly

Policy Statement, supra, at 1914. The regulatory context in which the Policy Statement was adopted is also relevant, and shows a trend beginning as early as 1936 toward increased restriction on media ownership combinations involving broadcast stations.

In 1938, the Commission commenced a proceeding to consider restrictions on "chain" (network) broadcasting, and subsequently adopted such restrictions in 1941. Those restrictions were affirmed by the United States Supreme Court in National Broadcasting Co., Inc. v. United States, 319 U.S. 190 (1943). The chain broadcasting restrictions were (and are) intended to prevent the networks from dominating the operations of existing stations, with detrimental effect upon the public interest and unaffiliated stations. Also in the

early 1940s, the Commission considered barring common ownership of newspapers and broadcast stations, but opted instead to address such ownership combinations on a case-by-case basis.² See FCC v. National Citizens Committee for Broadcasting, *supra*, note 4 at 706. In the ensuing years, the Commission broadened its multiple ownership restrictions. See Rules Governing Standard and High Frequency Broadcast Stations, 5 Fed. Reg. 2382, 2384 (1940); Rules and Regulations Governing Commercial Television Stations, 6 Fed. Reg. 2284, 2284-2285 (1941); Multiple Ownership of Standard Broadcast Stations, 8 Fed. Reg. 16065 (1943); Multiple Ownership of AM, FM and Television Broadcast Stations, 18 F.C.C. 288 (1953); and Multiple Ownership of Standard, FM and Television Broadcast Stations, 45 F.C.C. 1476 (1964). One might surmise that the "concern with undue concentration of economic power" grew as a post-hoc justification for the diversification criteria out of continued concern for domination of the national media by a few entities, and the economic advantage in combination selling of advertising by newspapers with radio outlets.

In 1992, the Broadcast media is no longer dominated by three networks owned by two entities having considerable

2. In the early years of broadcasting, newspapers were often the only entities willing and able to construct and operate new broadcast stations.

economic power. No longer are there so few broadcast stations that common ownership of a newspaper and broadcast station will provide market power in the sale of advertisements. No longer are broadcast stations the only immediate electronic media, or the only electronic media for that matter.

In 1992, there are a plethora of broadcast stations, many of which are on the brink of financial failure, or which have already failed, and the market is glutted with stations which are for sale. Concentration of economic power is not an issue, and entry into the industry for those with diverse viewpoints is much more open. With the increase in the total number of stations has come an increase in national ownership groups, minimizing the concern with national control of the media by a limited number of entities. Also with the increase in the total number of stations has come an increase in the number of broadcast networks, and in the independent (non-network) sources of syndicated (non-network) programming.

The broadcast media of 1992 also faces competition from multi-channel electronic media such as cable, wireless cable, satellite master antenna television, and perhaps soon, satellite-delivered nationwide multi-channel digital-audio and audio-video broadcast services and telephone company-provided audio and audio-video services. Technological advances threaten to leave broadcasting a disadvantaged, single-channel inferior quality electronic media -- if such advances have not

already done so. Indeed, the Commission has already ruled that it will allow a single entity to hold the licenses of multiple radio stations serving a single market, and has relaxed the national multiple ownership limits, finding such changes necessary to the economic survival of radio stations.³ Revision of Multiple Ownership Rules and Policies, 70 R.R.2d 903 (1992).

The developments outlined above, since the era in which the Policy Statement was adopted, accentuate the fact that the relevant market for the diversification criteria is the local market only. Particularly where non-network applicants are involved, it is the diversity of gatekeepers in the local market that is relevant. That a licensee of a station in market A is also the licensee of a station in market B, in no way lessens the diversity of viewpoints expressed in either market. Indeed, to the extent that economies of scale or periodic subsidization of a station which is economically weaker by a sister-station which is stronger, is possible, non-local ownership interests (which are not affected by the local economy) actually promote viewpoint diversity.

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3. Ownership combinations involving stations serving different markets, rather than stations serving the same market, serve the dual purposes of enhancing the financial stability and survivability of the stations and promoting diverse viewpoints in each market.

Thus, the Commission should modify the diversification criterion to award comparative demerits only to applicants having attributable media interests serving or distributed within the same market which the proposed station will serve. Interests outside the market proposed to be served are irrelevant.

II. Integration Credit Should
Be Awarded To Local Managers

Under the Policy Statement, the Commission awards comparative credit to owners of proposed licensees who will be integrated into management of the station on a day-to-day basis. The Commission explained the basis for awarding credit for such integration of ownership into management as follows:

It is inherently desirable that legal responsibility and day-to-day performance be closely associated. In addition, there is a likelihood of greater sensitivity to an area's changing needs, and of programming designed to serve these needs, to the extent that the station's proprietors actively participate in the day-to-day operation of the station.

Policy Statement, supra, at 1909. The realities of broadcast station operation, as they have developed and been recognized by the Commission since 1965, lead to a different conclusion, however.

First, the Commission has recognized that service in the public interest bears a direct correlation to a station's financial performance. In Policies Regarding Detrimental

Effects of New Broadcast Stations, 64 R.R.2d 583, 587 (1988), in which the Commission eliminated the Carroll Doctrine and the UHF Impact Policy, the Commission stated:

The Carroll Doctrine also conflicts with our general policy of relying wherever possible on market forces rather than on government regulation to direct the programming activities of mass media industries. We have consistently pursued regulatory policies intended to provide opportunities for development of alternative mass media technologies on the basis that an unrestricted, competitive environment generally leads to better service to the public than governmentally mandated market structures and service requirements.

See also, e.g., Deregulation of Commercial Television, 56 R.R.2d 1005 (1984) (Commission eliminates programming guidelines, formal ascertainment requirements, limits on commercialization and program log requirements stating, "We feel confident that existing and future marketplace forces will ensure the presentation of programming that addresses significant issues in the community."); Entertainment Formats of Broadcast Stations, 37 R.R.2d 1679 (1976) recon. denied 41 R.R.2d 543 (1977), rev'd WNCN Listeners Guild v. FCC, 610 F.2d 838 (1979), rev'd sub. nom. WNCN Listeners Guild v. FCC, 450 U.S. 582 (1981). (The Commission concluded that the public interest is best served by promoting diversity in entertainment formats through market forces and competition among broadcasters); Transfer of Broadcast Facilities, 52 R.R.2d 1081, 1087 (1982) (Commission finds that "in this

competitive environment the public interest is usually best served by allowing station sales transactions to be regulated by market forces," and eliminates "three-year rule"). Implicit in the principle that market forces best direct licensee programming decisions and assure operation in the public interest is the recognition that the station which best serves the public interest will best succeed financially. Weighing managerial responsiveness to market forces against this truism, one is struck with the irony of the Policy Statement. Non-owner managers are more sensitive to market forces and are thus more likely to better serve the public interest, to show better financial performance, and gain security and financial rewards in their position, than are owner-managers. Owner-managers have the luxury of being selectively responsive to market forces, and thus of being selectively responsive to the public interest, because they are not subject to dismissal if they do not maximize the station's financial performance.

Moreover, the Commission should well appreciate that management of a broadcast station typically requires much more than a 40-hour per week commitment, and station managers generally commit many more hours than the 40 hours necessary to earn the maximum possible integration credit. Given the extreme inflation in the sales prices of broadcast stations over the last decade, however, most licensees have other

business interests or investments which command their attention and limit their devotion to station operation -- at least to the 40 hour-per-week commitment necessary for an owner-manager to meet his integration pledge. For a non-owner station manager, however, successful station operations (service in the public interest) and his job security are obviously his sole or primary concern.

Modifying the integration criterion as proposed would also serve the purposes of the diversification criterion, as the escalation of the financial requirements to acquire a licensed broadcast station has resulted in much greater homogeneity among broadcast licensees than exists among broadcast managers. Granting integration credit for purposes of full-time local non-owner managers would therefore provide greater diversity of viewpoints in the local media.

Thus, the Commission should award maximum integration credit for applicants for new broadcast facilities who propose to employ full-time local managers at the proposed station.

III. Female Enhancement Credit Should Not Be Awarded

In Lamprecht v. FCC, 958 F.2d 382, the U.S. Court of Appeals for the District of Columbia Circuit overturned the Commission's award of enhancement credit for integration of female owners into station management on a day-to-day basis, finding that the preference violates the Equal Protection

Clause of the Fifth Amendment to the U.S. Constitution. The court's decision was based largely upon the finding that it had not been shown that integration of female owners into management has any meaningful impact upon the presentation of "womens programming." Playa Del Sol agrees that as a result of EEO requirements which promote female staffing of stations, along with financial performance-motivated licensee sensitivity to the public interests, concerns and needs in station's service areas, all stations have a strong motivation to present a balance of programming serving the needs of their service areas. Moreover, given that women generally represent the largest and most demographically important segment of a station's audience, there are few or no disincentives for a station to present women's programming or viewpoints.

Most significantly, however, for the Commission to grant a preference intended to promote presentation of particular viewpoints or ideas would violate the First Amendment to the United States Constitution.

Thus, the Commission should not award enhancement credits for proposals to integrate female-owners into day-to-day station management.

IV. The Commission Should Award Comparative
Credit For Continuity Of Service

Another factor mitigating against the assessment of comparative demerits under the diversification criterion for out-of-service area broadcast interests is that service continuity should be encouraged, but is actually discouraged by the requirement that applicants propose to divest out-of-service-area stations. While the mid-to-late 1980s was a boom time for broadcast station brokers and attorneys, it was the dark ages for broadcast operations and the broadcast public. Stories abound of stations which were sold repeatedly during this period, so that the staffs did not know whether they would continue to be employed from one day to the next, over a period of years! Naturally, the more talented or marketable members of these staffs of these stations sought more stable employment, while the balance of these staffs was distracted by uncertainty.

Playa does not suggest that station transactions are undesirable per se, but when stations are bought and sold in the expectation and speculation of profits from appreciation (particularly of "stick value") and resale in an inflationary market, licensees lack the incentives for operation in the public interest to gain an increased share of the audience which in turn results in increased station value. In other words, such an inflationary market encourages making profits

the easy way -- through holding a station while incurring the minimum expense until station values appreciated generally, and then selling it; rather than making profits the "old-fashioned way" -- through diligent ascertainment of the needs and interests of the service area, and serving those needs and interests in order to build market share and operating profits, with station sales only as necessary to acquire other stations and pursue greater opportunities for serving the public interest.

Promoting continuity of ownership also promotes of the public interest by permitting radio station licensees' operations to place currently ascertained community interests, concerns and necessities in the context of what has gone on before, and to provide that historical perspective on current developments and events which can be so vital and give them meaning. Absent this perspective, public service and news programming lack depth and insight and are merely anecdotal footnotes to local life. Long term broadcasters will also have a better appreciation of the broadcaster's critical role in an educated, informed and free society, and a better sense of the journalistic ethic, than will mere "profit seekers."

To encourage continuity, the Commission should reward those licensees whose operations are better characterized as long-term commitments to public service than pursuit of the "quick buck." Continuity of service credits should be awarded

to applicants for new facilities who have continuously held stations and operated them in the public interest, selling them only when necessary to pursue another long term station ownership opportunity, rather than trafficking in stations and "flipping" them as quickly as a profit could be realized.

Awarding such a credit as proposed would avoid penalizing committed licensees for divesting stations to "trade-up" and better serve the public interests, and it would avoid discouraging the transfer of stations to licensees who may be more willing and/or able than the current licensees to make investments in improving the stations and better serving the public interest. Nevertheless, it would reward and encourage long-term investments in serving the public interest, convenience and necessity, and thus discourage deleterious trafficking in quest of short term profits from the purchase and sale of stations, which is often accompanied by licensees minimizing their investment in contemplation of a quick sale and profit.⁴ Indeed, the financial straits in which many stations now find themselves are the result of licensees

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4. Playa Del Sol also notes that the "application mills" which are deleteriously deluging the Commission with applications for wireless cable authorizations often dupe innocent members of the public into investing in such applications with the promise of huge profits from sale of an operating system, while minimizing the expense of acquiring, constructing and operating the facilities and totally ignoring the possibility of earning profits from operation of such systems.

purchasing the station under a relatively short, "balloon" financing arrangement in contemplation of selling the station to yet another buyer before the balloon payment fell due.

Thus, the Commission should award applicants for broadcast authorizations credits for continuity of service at other facilities.

V. Modifications To The Comparative Criteria Should Be Applied To Pending As Well As Future Proceedings

The Commission has proposed to apply any modifications to its comparative criteria to applicants designated for hearing after the effective date of the Order adopting revised criteria. While this may simplify administrative matters by obviating the necessity to hold pending proceedings in abeyance, it is not legally defensible. First, in Bechtel v. Federal Communications Commission, 957 F.2d 873 (D.C. Cir. 1992), the Court of Appeals for the District of Columbia stated that the Commission must consider the effect of other changes in its policies and rules on the comparative criteria. The Commission cannot justify engaging in that consideration with respect to the Bechtel case and cases designated after adoption of revised criteria, but not cases decided between January 31, 1992 (the date the Bechtel decision was released) and the adoption of revised criteria. Application of the revised criteria to all pending

applications is also consistent with the 1965 Policy Statement on Comparative Broadcast Hearings, under which the Commission is obligated to consider "other relevant factors." Policy Statement, supra, at 1913.

VI. Conclusion

Playa Del Sol has demonstrated herein that in today's regulatory and business environment, the Commission can best constitutionally promote the operation of broadcast stations in the public interest, convenience and necessity by (i) considering under the diversification criteria only stations serving the same market, (ii) granting integration credit for non-owner local managers, and (iii) denying enhancement credit for integration of female owners. The Commission should also grant continuity of service preferences to reward and encourage long-term dedication to the public interest and discourage the elevation of personal interests above the public interest. Each of these changes should be applied to pending as well as new proceedings, as continued application of criteria the Commission recognizes are flawed and antiquated cannot be rationally justified.

Respectfully submitted,

PLAYA DEL SOL BROADCASTERS, INC.

By: 
Michael L. Glaser

By: 
Joseph P. Benkert

HOLME ROBERTS & OWEN
1700 Lincoln St., Suite 4100
Denver, CO 80203
(303) 861-7000

June 2, 1992

Certificate of Service

I, Teresa M. Fisher, a secretary in the law firm of Holme Roberts & Owen, do hereby certify that I have on this 2nd day of June, 1992, sent by United States First Class Mail, postage prepaid, a copy of the foregoing "COMMENTS OF PLAYA DEL SOL BROADCASTERS" to the following:

Charles Dziedzic, Esq. *
Chief, Hearing Branch
Gary Schonman, Esq.
Mass Media Bureau
Federal Communications Commission
2025 M Street, N.W., Room 7212
Washington, D.C. 20554

David F. Tillotson, Esq.
Arent, Fox, Kintner, Plotkin & Kahn
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036



Teresa M. Fisher

* Hand Delivered